

## Durham Research Online

---

### Deposited in DRO:

14 June 2018

### Version of attached file:

Accepted Version

### Peer-review status of attached file:

Peer-reviewed

### Citation for published item:

Minto, David (2018) 'Perversion by penumbras : Wolfenden, Griswold, and the transatlantic trajectory of sexual privacy.', *American historical review.*, 123 (4). pp. 1093-1121.

### Further information on publisher's website:

<https://doi.org/10.1093/ahr/rhy027>

### Publisher's copyright statement:

This is a pre-copyedited, author-produced PDF of an article accepted for publication in *American historical review* following peer review. The version of record Minto, David (2018). *Perversion by Penumbras: Wolfenden, Griswold, and the Transatlantic Trajectory of Sexual Privacy*. *American Historical Review* 123(4): 1093-1121 is available online at: xxxxxxxx <https://doi.org/10.1093/ahr/rhy027>.

### Additional information:

---

### Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

# Perversion by Penumbras: Wolfenden, *Griswold*, and the Transatlantic Trajectory of Sexual Privacy

When in March 1961 the US Supreme Court considered the constitutionality of a Connecticut birth control law that prohibited the use of contraceptives, the majority of justices found no case or controversy at hand. The Connecticut statute, together with a provision condemning accomplices to crimes, had for years prevented the operation of birth control clinics in the state. None of the appellant couples, though, had been subject to police action and the court record did not reveal any prosecutions in the state for usage. Furthermore, contraceptives were commonly sold in Connecticut drug stores—"notoriously" so, as the court put it. Delivering the plurality's opinion, Justice Frankfurter stressed: "This Court cannot be umpire to debates concerning harmless, empty shadows."<sup>1</sup>

Four years later, however, and the justices detected something more consequential in the gloaming. Indeed, by June 1965 the majority held that in the "penumbras" of the US constitution's stated protections—in the light-dark interplay of "emanations from those guarantees that help give them life and substance"—lay a "right of privacy older than the Bill of Rights." In luminous literality, the federal constitution nowhere mentioned privacy directly. Yet in *Griswold v. Connecticut*, the Supreme Court perceived a penumbral "zone of privacy" somewhere in the textual shadows that became decisive to the appeal of Planned Parenthood leaders, charged as accessories for providing married couples with birth control. This time the Supreme Court saw more than "harmless, empty shadows." Rather, it insisted that "forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights."<sup>2</sup>

How the Supreme Court came to articulate a constitutional right to privacy is a great riddle of postwar US liberalism and sexual politics, but our explanations neglect a crucial piece of the puzzle. The most convincing accounts to date portray the court's so-called "discovery" of the right as extending doctrinally from tort privacy cases centered on control of information and criminal procedure cases involving invasive police tactics.<sup>3</sup> At the time of *Griswold*, these factors were enhanced through a tradition of US common law privacy commentary, the urgency of Cold War privacy anxieties, and not least birth control activist efforts. All of these aspects surely had influence and most can be readily seen in the court's reasoning. My contention, however, is that a crucial additional factor lies in a twilight world beyond obvious sexual and sovereign borders—namely, in the transatlantic diffusion of Britain's 1957 Wolfenden Report on prostitution and homosexual offences.<sup>4</sup> If I'm right, it means that a legislative call for the UK Parliament to

---

<sup>1</sup> *Poe v. Ullman*, 367 U.S. 497 (1961).

<sup>2</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>3</sup> Among historians, Leigh Ann Wheeler's account emphasizing the cross-pollination of these concerns sets the standard. Leigh Ann Wheeler, *How Sex Became a Civil Liberty* (Oxford: Oxford University Press, 2013), 93-119.

<sup>4</sup> For an indication of the broader possibilities that may be encompassed by transnational histories of sexuality or by queering a geographic field such as that presented by the "US in the world" see, among others, Elizabeth A. Povinelli and George Chauncey, "Thinking Sexuality Transnationally: An Introduction," *GLQ: A Journal of Lesbian and Gay Studies* 5:4 (1999), 439-49; Inderpal Grewal and Caren Kaplan, "Global Identities: Theorizing Transnational Studies of Sexuality," *GLQ: A Journal of Lesbian and Gay Studies* 7:4 (2001), 663-79; Margot Canaday, "Thinking Sex in the Transnational Turn: An Introduction," *American Historical Review* 114:5 (2009),

decriminalize homosexuality on account of a realm of private morality transformed into a US constitutional right to privacy protecting the use of contraceptives by married couples.<sup>5</sup>

Put so bluntly, it is unsurprising that scholarship on *Griswold* overlooks Wolfenden.<sup>6</sup> Nevertheless, a compelling case can be made that the British report's utilitarian identification of a "realm of private morality and immorality which is...not the law's business" helped shape what became apparent as a right within the US constitution.<sup>7</sup> Scholars have occasionally noted in passing Wolfenden's galvanizing effect on postwar US gay activists. This was indeed formidable, one Californian homophile journal asking on its November 1957 cover: "Is it a Magna Carta for Homosexuals?"<sup>8</sup> But to the extent that queerness remains underappreciated as a consequential topic of historical enquiry beyond identity movements, it suits me to reveal its unsuspected centrality to the clear significance of privacy's US constitutional recognition. *Griswold* did more than trumping an unusual state law honored largely in the breach; critics and admirers alike can view the decision as a judicial recalibration of private/public divides, traversing sexual lives and social contracts. Over the decades, it has proved both legally salient and politically controversial, enabling a distinctive line of constitutional interpretation of sometimes fiercely disputed legitimacy. For better or worse, *Griswold* intervened in fundamental relationships between intimacy, the state, morality, and law. Queerness, I will argue, helped underwrite its innovation.

A figure of speech in Robert Self's recent analysis of familial postwar US politics betrays a general historiographic trend largely oblivious to Wolfenden's penumbral operation. Discussing *Griswold*, Self asserts that "[e]xtending either negative or positive rights to gay men and women remained unimaginable in American law and politics in the mid-Sixties."<sup>9</sup> Wolfenden's

---

1250-7; and Laura Belmonte et al, "Colloquy: America in the World," *Diplomatic History* 40:1 (2016), 19-80.

<sup>5</sup> Major works addressing the Wolfenden Report's production, political philosophy, and effect on British sexual politics include: Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (London: Quarter Books, 1977); Stuart Hall, "Reformism and the Legislation of Consent" in National Deviancy Conference (ed.), *Permissiveness and Control: The Fate of Sixties Legislation* (New York: Barnes & Noble, 1980), 39; Patrick Higgins, *Heterosexual Dictatorship: Male Homosexuality in Britain* (London, Fourth Estate: 1996), Leslie J. Moran, *The Homosexual(ity) of Law* (London, Routledge, 1996); Derek McGhee, *Homosexuality, Law & Resistance* (London, Routledge, 2001); Matt Houlbrook, *Queer London: Perils and Pleasures in the Sexual Metropolis, 1918-1957* (Chicago University Press, 2005); Frank Mort, *Capital Affairs: London and the Making of the Permissive Society* (New Haven: Yale University Press, 2010); and Roger Davidson and Gayle Davis, *The Sexual State: Sexuality and Scottish Governance* (Edinburgh University Press, 2012). A critical sourcebook is also available: Brian Lewis, *Wolfenden's Witnesses: Homosexuality in Postwar Britain* (London: Palgrave Macmillan, 2016).

<sup>6</sup> Wolfenden's role in precipitating a US constitutional privacy right is perhaps more intuitive to legal scholars than historians due to the jurisprudential importance of the so-called Hart-Devlin debate that followed the report, yet here too the significance of the link has become more obscure. For instance, while a 1980 law journal article on sex and the Burger Court briefly noted that contemporary legal commentators "immediately saw" *Griswold* as injecting the report's privacy recommendation into constitutional law, a more recent article on doctrinal conditions enabling the decision mentions neither Wolfenden nor Hart-Devlin. I discuss their absence in more historically oriented accounts below. See Thomas C. Grey, "Eros, Civilization and the Burger Court," *Law and Contemporary Problems* 43:3 (Summer 1980), 84, and Ryan C. Williams, "The Paths to *Griswold*," *North Dame Law Review* 89:5, 2155-88.

<sup>7</sup> A related argument about the bearing of global human rights discourse on mid-century US judicial decisions is advanced in Mark Philip Bradley, *The World Reimagined: Americans and Human Rights* (Cambridge: Cambridge University Press: 2016).

<sup>8</sup> *Mattachine Review*, November 1957, cover.

<sup>9</sup> Self's position here stands for the general trend in the historiography related to *Griswold*. Neither David Garrow's magnum opus *Liberty and Sexuality*, nor John Johnson's more recent *Griswold vs. Connecticut* reference either the

prominence in contemporary US legal and public culture, however, suggests that the protection of gay sex was, if not realizable, eminently intelligible for lawyers, gay activists, and others—a proposition that I argue better explains the Supreme Court’s strenuous attempts to banish perversion from its own intuition of what a right to privacy contained. Homosexuality lurked behind *Griswold* not simply as the outlandish nightmare of where the justices’ discovery might lead, but also because the specter of gay sex had been so stimulating of transatlantic privacy talk in the first place. This basic trajectory provides a necessary corrective to our tendency to imagine histories of sexual politics as expanding outward to encompass the ever more marginalized, as plotted by the dates of headline reform. Even so impressive a study as Leigh Ann Wheeler’s *How Sex Became a Civil Liberty*, in taking the ACLU’s priorities as its own, implies a path whereby birth control politics in effect provided the originating font of sex as civil liberty. Yet, while often omitted from official records, homosexuality’s taboo status could give it outsized if unacknowledged power. From this angle, the protection of gay sex can indeed appear a precursor to, as well as a result of, other kinds of sexual privacy claims.<sup>10</sup>

This article then shows how the transatlantic trajectory of the Wolfenden Report spurred a significant US legal and political shift towards legitimizing sexual privacy that subsequently resulted in constitutional rights to not only contraception, but also abortion and—decades later—same-sex intimacy. In exploring the British report’s stateside reception, I pay particular attention to two groups proximate to its disturbance of constitutional doctrine: homophile activists and lawyers. The former had closely followed events in Britain since the Wolfenden Committee’s inception in early 1954 and were quick to see the report’s bearing on their own situation. Legal practitioners, commentators, and theorists, meanwhile, developed an expansive appreciation of Wolfenden’s privacy principle, transatlantic hubbub over Britain’s homosexual question translating into hundreds of references in law journals, textbooks, and debates that addressed subjects sometimes far removed from the homophile ambition of challenging state sodomy laws. Indeed, the notion that the criminal law had no business policing private gay sex, even when the majority of the community viewed it with disgust, raised questions touching on the very nature of law and its relation to morality. While by the time of *Griswold* Connecticut’s birth control prohibition was unusual among the states and its targeting of use unique, earlier US reform efforts had not depended on a claimed constitutional “right to sexual privacy”—an anachronistic expression on both sides of the Atlantic until the late 1950s. Wolfenden, transplanted from British utilitarian discussions to a US context of increasingly forceful civil rights claims, made it politically and doctrinally easier for the Supreme Court to recognize a fundamental right in this area. But the queer source of stimulation also encouraged the justices to contain the emerging

---

Wolfenden Report or the subsequent Hart/Devlin debate over its jurisprudence. Michael Sandel’s chapter on “Privacy Rights and Family Law” in *Democracy’s Discontent*. Even William Eskridge’s recent work on sodomy laws, *Dishonorable Passions*, mentions the report only in passing. David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Berkeley: University of California Press, 1994); John W. Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (Lawrence: University Press of Kansas, 2005); Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge: Belknap Press of Harvard University Press, 1996); Robert O. Self, *All in the Family: The Realignment of American Democracy since the 1960s* (New York: Hill and Wang, 2012); and William N. Eskridge, *Dishonorable Passions: Sodomy Laws in America, 1861-2003* (New York: Penguin, 2008).

<sup>10</sup> Wheeler does briefly reference the Wolfenden Report on two occasions when citing ACLU sources, but presents cross-pollination from police intrusion cases (particularly *Mapp v. Ohio*, 367 U.S. 643 (1961)) as the explanation for an advocate-led innovation of constitutional sexual privacy. See Wheeler, 103.

right's potential in the name of a supposedly natural and timeless marital privacy.

The combination of homosexuality's stigmatized silence and affective power in US culture between *Wolfenden* and *Griswold* requires a note about its presence in my sources. On the one hand, it would be surprising to see US advocates of birth control appealing to homosexual precedent directly; lawyers anxious to argue their best case before judges had strong incentive to separate themselves from a more abject issue than their own cause, especially when there was some relation between the two. It is not therefore surprising that historians who lead with the briefs of birth control activists or the papers of Supreme Court justices tell a different story than I do.

Constitutional decisions, however, do not derive from these sites alone. Rather, my argument rests on *Wolfenden*'s role in the cultural cloud-seeding of an atmosphere that made a privacy right conceptually legible and politically realizable.<sup>11</sup> Indeed, I want to suggest the relevance to constitutional penumbras of a queer studies approach that reads between the lines of public cultures saturated by queerness while suppressing open mention. I find an ally here in legal scholar David Alan Sklansky who, in explaining the 1967 Supreme Court decision in *Katz* on the privacy protections of a telephone booth, persuasively establishes a subtext of growing judicial unease with anti-gay policing that transgressed the privacy expected in washroom stalls. Sklansky, taking inspiration from the clear role policing of African-Americans played in criminal procedure reform beyond its overt citation in mid-century legal texts, also draws on the foundational work of queer studies scholar Eve Sedgwick, who forcefully repositioned the "nominally marginal" matter of "hetero/homosexual definition" as central to "modern Western culture."<sup>12</sup> And homosexuality, more than simply operating as a "secret subtext," also presents a "subtext *about* secrets."<sup>13</sup> In other words, we may detect, as Sedgwick claimed and as Sklansky reiterates, a "distinctly indicative relation of homosexuality to wider mappings of secrecy and disclosure, and of the private and the public." Its bearing on mid-1960s legal thought about privacy could be substantive and reflexive.<sup>14</sup>

The Supreme Court itself barely referenced homosexuality until the 1980s, and its only direct intervention prior to *Griswold* was a terse 1958 reversal of a decision that had ruled a homophile magazine obscene.<sup>15</sup> That hardly means, however, that queerness could be ignored. As Marc Stein has noted, many of the Warren Court justices had close encounters with

---

<sup>11</sup> A similar move is made by new "demoprudence" scholarship bridging legal judgments and a broader public sphere of social activism. For instance, Lani Guinier and Gerald Torres in "Changing the Wind: Notes Toward a Demoprudence of Law and Social Movements," *Yale Law Journal* 123:8 (June 2014) argue that African-American civil rights and social justice movements in the 1950s and 1960s did not simply influence formal legal changes, but in effect were sources of law, ensuring certain legal conclusions became inevitable. But homophiles had neither the connections to power of Martin Luther King, nor the ability to project the moral authority of the movement he represented. Although in this article I am advancing a different relationship between homosexuality's cultural position and the law—one that avoids strong claims about law's top-down bearing on identity—legal scholars who have considered homophile interaction with the US court system categorize litigation as largely defensive until around the time of *Griswold*, after which affirmative impact-type litigation became more common. See William N. Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge: Harvard University Press, 1999) and Craig J. Konnoth, "Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s," *Yale Law Journal* 119:2 (2009).

<sup>12</sup> David Alan Sklansky, 'One Train May Hide Another': *Katz*, Stonewall, and the Secret Subtext of Criminal Procedure," *UC Davis Law Review* 41:3 (2008), 875-934. Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley and Los Angeles: University of California Press, 1990), 1-2.

<sup>13</sup> Sklansky, 878, after Sedgwick, 22.

<sup>14</sup> Sedgwick, 71.

<sup>15</sup> Sklansky, 897-9. *One, Inc. v. Olesen* 355 U.S. 371 (1958).

homosexuality.<sup>16</sup> More significantly, from the late 1950s to early 1960s the subject began to receive greater media attention in the United States than ever before, even as it retained an aura of dubiety and indeterminacy. Earlier episodes of devastating Lavender Scare rumour mills and innuendo-laden flare ups did anticipate later dynamics, not least when revived by a 1964 scandal surrounding presidential aide Walter Jenkins.<sup>17</sup> But in terms of sheer quantity of reference, the years immediately preceding *Griswold* precipitated a seismic shift in the US publicity of homosexuality. Radio programs, TV documentaries, magazine articles, and the breakdown of Hollywood's Hays Code all helped to expose gay subculture's sophisticated modes of discretion while compelling even more self-conscious, if less censorial, cultural policing of the still mysterious and potentially porous boundaries of homosexual difference. The threatened permeability of homosexuality's unnatural shame and its assumed contrast to the transparent self-evidence of heterosexuality suggests why ascendant signification could continue to inspire visions of a suspended, twilight world. D. A. Miller for one has argued that in the postwar period homosexuality's "dusky existence" obtained unique distinction as "subject matter whose representation in American mass culture appertained exclusively to the shadow kingdom of connotation, where institutions could be at once developed and denied."<sup>18</sup> Amidst sexuality's heightened intimations, little was so revealing as lingering ambiguity, Lee Edelman describing the interplay of a double cultural imperative that both marked gay male bodies and registered their indeterminacy.<sup>19</sup> Although *Wolfenden* circulated close to the Supreme Court, its influence possessed something of the open secret that disturbed and fascinated without being named, interest itself rendering the onlooker suspect.

*Wolfenden* was not the only factor producing *Griswold*, but its queer penumbral influence should be brought out of the shadows of this particular Supreme Court *noir*. The establishment of a right to privacy may seem overdetermined, but two judges dissented, two concurred without joining the majority opinion, and other remedies were possible. As Planned Parenthood counsel Catherine Roraback remembered it, privacy had barely been on the radar in the late 1950s for those strategizing the demise of Connecticut's birth control law, and its subsequent arrival as a constitutional right struck even its advocates as far from automatic.<sup>20</sup> Yes, postwar US commentators routinely cast privacy invasion as a hallmark of Soviet totalitarianism amidst their own intensifying anxieties about "cold war surveillance in the realms of gender and sexuality," as Deborah Nelson has argued.<sup>21</sup> And yes, the Supreme Court cited these concerns in *Griswold* and furthermore leant heavily on a famed US tradition of legal commentary initiated by the 1890 article of Samuel Warren and Louis Brandeis titled "The Right to Privacy." But despite the obvious bearing of these concerns on the decision, we shouldn't lose sight of the contingent articulation of so loose a concept as a fundamental right—least of all by unelected justices who

---

<sup>16</sup> Marc Stein, *Sexual Injustice: Supreme Court Decisions from Griswold to Roe* (Chapel Hill: University of North Carolina Press, 2010), 10-3.

<sup>17</sup> David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004), 197-9.

<sup>18</sup> D. A. Miller, "Anal Rope," *Representations* 32 (1990), 119.

<sup>19</sup> Lee Edelman, *Homographesis: Essays in Gay Literary and Cultural Theory* (New York: Routledge, 1994), 9-11, 237.

<sup>20</sup> Catherine Roraback, "Catherine G. Roraback, 'Griswold v. Connecticut: A Brief Case History,'" *Ohio Northern University Law Review* 16:3 (1989): 395-401.

<sup>21</sup> Deborah Nelson, *Pursuing Privacy in Cold War America* (New York: Columbia University Press, 2002), 13.

risked the accusation of rewriting the constitution.<sup>22</sup>

Wolfenden indeed helped both to tip the political balance for recognition and to shape what *Griswold*'s right to privacy meant amidst other factors whose influence is less determinant than historians often recognize. Even Warren and Brandeis's article, legal scholar James Whitman has argued, is best viewed "not as a great American innovation, but as an unsuccessful continental transplant," given US law's reluctance to adopt its overriding concern with a European-inflected privacy right protecting dignity from insult.<sup>23</sup> And in *Griswold*, contraception's case for constitutional innovation came with the baggage of failing to present a live controversy four years earlier in *Poe*. Leigh Ann Wheeler makes a compelling case that procedural objections to police search and seizure cases—in particular 1961's *Mapp v. Ohio*—encouraged the ACLU to think intertopically about privacy's relation to constitutional law and demonstrates that Connecticut birth control activists also drew connections to bedroom surveillance.<sup>24</sup> Yet in *Poe* the court had already cast such threats as chimerical, while contraception's entwinement with disease control and demography muddled the separation from state interest a right to privacy would assert. The surveillance and arrest of men for gay sex, by contrast, clearly presented an actual occurrence, one that brightly raised where the private/public dividing lines of sex for pleasure's sake might lie. As Anna Lvovsky has shown, cruising grounds in the mid-1960s presented judges below the US Supreme Court with public order and policing questions that could turn on, for example, whether any formation of water closet architecture amounted to protected private space.<sup>25</sup> But with many gay men taking obvious pains to hide their sex lives from view, their criminalization sharply posed whether moral standards in themselves justified law.

Penumbras amount to more than judicial side-eye, their association with eclipses evoking shifts in worldview. While my argument regarding Wolfenden's bearing on *Griswold* advances primarily through a deliberative reading of the traction its jurisprudential outlook gained in the US legal system, the broader operation of a cultural filter capable of producing the below stateside rendition should not be underestimated:

FIGURE 1: [Cover](#) of *The Wolfenden Report* (New York: Lancer Books, 1963) removed for copyright reasons.

There are of course many acts of translation that transformed the British official enquiry's standardized blue book into "A BOLD STUDY OF ABNORMAL SEX" with its dubious claim to bestseller status, its genealogical appeal to Alfred Kinsey, its imprimatur by US sociology, and its repackaging by Karl Menninger – a prominent Kansan psychiatrist whose introduction cast homosexuality (contrary to the report) as an illness and ranked "high in the kingdom of evils." But important here too is the double move of sensation and secrets that constitutes its visual prurience

---

<sup>22</sup> Louis Brandeis and Samuel Warren, "The Right to Privacy," *Harvard Law Review* 4:5 (1890). Later as a Supreme Court justice, Brandeis made a further influential articulation of this purported right through his dissent in the wiretapping case *Olmstead v. United States* 277 US 438 (1928).

<sup>23</sup> James Q. Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty," *Yale Law Journal* 113:6 (2004), 1204.

<sup>24</sup> Wheeler, 96-105. *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>25</sup> Anna Lvovsky, "Cruising in Plain View: Clandestine Surveillance and the Unique Insights of Antihomosexual Policing," *Journal of Urban History* (2017).

and suggests an analogue to how privacy became named as a thing. The design here went beyond simply being garish in its bold type and neon colours, the design almost simulating the title sheet being ripped off to reveal burning indiscretions beneath. It was an aesthetic carried over to a blared announcement on the inside page: “THEY LIVE IN THE SHADOWS.” This US pocketbook edition of course provided just one mode of Wolfenden’s transatlantic transmission as Connecticut birth control law came under judicial scrutiny and probably had little legal, let alone constitutional, bearing in itself. Yet as one of many contemporary urges to make homosexuality textual, it formed part of cultural front that could wrest active, positive protection of privacy from opposition prone to framing rights in terms of nature and original intent. As Wolfenden’s penumbral force grew inescapable, it resonated with an unwritten constitutional right found somewhere between brilliance and obscurity.<sup>26</sup>

Appreciating the overarching trajectory of Wolfenden’s transatlantic journey requires an initial account of the report’s production and release, itself inflected with transnationalism, as we shall see. The finished report, of course, constituted a sensational package, and it is easy to grasp why a 1950s official British enquiry recommending decriminalization of gay sex would attract media attention abroad. In the United States, imagined Anglo-American legal inheritance and a formidable infrastructure of law schools and journals would also encourage engagement with the report’s striking contribution to liberal jurisprudence, especially given US Cold War boosterism for the rule of law. But radical adaptation remained possible. For one thing, the Wolfenden Committee viewed the subject of homosexual offences through a utilitarian weighing of social positives and negatives, asking what purpose the law served, whether it was enforceable, and (to some extent) whether it caused unnecessary pain. By contrast, a US rights culture reacting to the due process violations of McCarthyism and bolstered in public consciousness by the African-American civil rights movement had strong potential to rearticulate the report in terms of a particular right.<sup>27</sup>

From a number of angles, the committee’s inauguration itself suggests the report’s later propensity to travel. Dominant explanations for why Churchill’s government initiated an enquiry into the law on homosexual offences and prostitution argue the move was more about shelving an unsavory political problem than solving it. It aimed, in other words, at containment. Yet if the 1954 creation of this twelve-man, three-woman enquiry meeting *in camera* might abate immediate political concern over rising recorded sexual offences and prominent gay scandals, the novelty of Wolfenden’s queer mission was still imbued with potent symbolism that reached beyond Britain.<sup>28</sup> Even before the enquiry was announced, major US newspapers among other foreign media had noted England’s spate of vice sensations, which included the 1953 arrest of actor John Gielgud for solicitation and the 1954 convictions of peer Edward Montagu and journalist Peter Wildeblood

---

<sup>26</sup> Karl Menninger introduction to *The Wolfenden Report* (New York: Lancer Books, 1963), 9.

<sup>27</sup> For a reading of the utilitarian philosophical approach underpinning the final report, see Mark Tebbit, *Philosophy of Law: An Introduction* (London: Routledge, 2000).

<sup>28</sup> By the end of 1953 publicity of both scandals and numbers produced a number of significant calls to initiate reform. See Kingsley Martin, “Society and the Homosexual,” 31 October 1953, 508; “Homosexuality,” *Observer*, 15 November 1953; and “A Social Problem,” *Sunday Times*, 1 November 1953, 6.



for gross indecency. And before the committee had convened, one reader of the Chicago-based *Christian Century* felt emboldened to write to its appointed chair—Reading University head John Wolfenden—to stress that “social evils are not confined by political boundaries.” He wasn’t the only foreigner to emphasize the cross-border import of the committee’s task. With a different agenda, a recently formed international homophile organization in Amsterdam forwarded research to Wolfenden indicating that “in a modern world the rights of important minority-groups are on the way to be fully recognized.” Although the British enquiry declined to interview its leader, the International Committee for Sexual Equality (ICSE) assured its own supporters it had “done everything in its power to approach the committee.”<sup>29</sup>

The ICSE’s strenuous effort reflected the significance of Britain’s state inquiry to homophile groups springing up in the West, even where (as in the Netherlands) gay sex between consenting adults was legal and homophile clubhouses enjoyed official sanction. But the group’s intervention and brief invocation of rights was always likely to fall on deaf ears. From the outside, the Wolfenden Committee appeared to present the first significant opportunity for homophiles to influence debate on the international stage since the ICSE’s inaugural conference in 1951. Then, via telegram, it had called on the United Nations to extend “human, social and legal equality to homosexual minorities throughout the world” in the wake of the Universal Declaration of Human Rights.<sup>30</sup> Five years later and the ICSE’s memo to Wolfenden invoked individualist claims as well as ethnic minority protections as it questioned whether legislators should “intervene in the most intimate and individual expression of the human being when his activities and his actions are neither individually nor socially a danger.”<sup>31</sup> The ICSE’s overall emphasis though fell on utilitarian-driven European penal code reform; its appeal was to a broad calculation of social well-being rather than an individual or minority group right trumping other considerations. But the nature of the organization would have rendered its judgment suspicious to British elites. Among the most crucial acts bringing the Wolfenden Committee into being was a 1954 Church of England call for homosexual law reform in part on the grounds that current criminal penalties were creating an aggrieved “self-conscious minority,” contrary to the “British conception of sociological principle.”<sup>32</sup> The ICSE’s obvious self-interest and perceived subjectivity cut against an Establishment enquiry that favored supposedly disinterested officials and professionals who claimed to act for the public as a whole.<sup>33</sup>

Such a “British conception,” however, did not mean that the committee was oblivious to the significance of foreign viewpoints or experience. While other scholars have linked the report’s recommendation to the committee’s experience of London street culture and queer friends and

---

<sup>29</sup> “Committee Named to Investigate Homosexuality, Prostitution,” *Christian Century*, 29 September 1954, 1183. Clarence C. Case to Vice-Chancellor Wolfenden, 1 November 1954), HO 345/2, British National Archives (hereafter BNA). International Committee for Sexual Equality, bulletin, July 1955, 4.

<sup>30</sup> For text, see the cover of *Der Kreis*, July 1951, reprinted in Leila Rupp, “The Persistence of Transnational Organizing: The Case of the Homophile Movement,” *American Historical Review* 116:4 (October 2011), 1016.

<sup>31</sup> Memo from ICSE to Wolfenden Committee, [25 June 1955], HO 345/8, BNA. On the broad international conceptual shift from interwar minority rights to postwar human rights, see Mark Mazower, “The Strange Triumph of Human Rights, 1933-1950,” *The Historical Journal* 47:2 (2004).

<sup>32</sup> Church of England Moral Welfare Committee, *The Problem of Homosexuality: An Interim Report by a Group of Anglican Clergy and Doctors* (private circulation, 1953).

<sup>33</sup> The Wolfenden Committee informed the ICSE it would be willing to consider its views in writing, but did not invite the group’s president to interview, much to its leadership’s chagrin. See W.C. Roberts to Floris van Mechelen, 12 May 1955, and “Wietboek,” 28 February, 1957, Box 160, COC Papers, Nationaal Archief, Den Haag.

family members, international visions also shaped its outlook and increased the prospect of subsequent influence on the international scene.<sup>34</sup> Although the secretary dismissed agreements such as the United Nations protocol on sex trafficking and the European Convention on Human Rights as irrelevant, consciousness of homosexuality's legal and cultural position in other countries asserted itself from the very first interview. Here, barrister Kenneth Diplock provided his colleagues with a hasty run down on Europe's Code Napoleon regimes, where private gay sex was legal. And the desire to know more about the broad implications of legal reform led the committee to make formal enquiries at embassies for the Netherlands, Sweden, and West Germany, and the report's eventual appendices contained included a summary of European laws. Beyond simply sourcing comparative information, an international outlook sometimes exposed the transnational currents informing liberal convictions. Diplock, for instance, noted that Germany's severe persecution of homosexuals had been instituted "under Hitler." Labour politician William Wells urged that the final report should emphasize that "the only European countries where the law is the same as it is here are Russia, which has never known a free society, and Germany, which destroyed it in the 1930s." Such positions aligned with a broader British reaction to the privacy invasions and public slurs of US McCarthyism, that elsewhere even extended to a degree of recognition of Washington's Lavender Scare.<sup>35</sup>

That alignment also inflected an encounter with US sex researcher Alfred Kinsey, who bolstered the case for regarding a certain degree of homosexual freedom as a necessary part of Western postwar liberalism. Kinsey's opening remarks to a specially convened subset of the committee emphasized that no international evidence indicated that decriminalizing private gay sex increased the incidence of homosexuality, heading off a consistent witness fear. By contrast, Kinsey's account of US sodomy laws, sexual psychopath legislation, and public indecency statutes prompted the committee's leading medical expert to remark upon "the ferocity of anti-homosexual laws" in the United States. This influential member of the enquiry later told Kinsey that his testimony was "quite the most informative morning that we have had." The US professor, who had taken a strong interest in Britain since the 1953 homosexual scandals, in turn reported to his colleagues at the Institute for Sex Research that "as a Commission there is no doubt of their liberality," and he expected them to recommend decriminalization. Signaling the weight of transatlantic effects that his own witness testimony also evidenced, he affirmed that "this sort of thing will strengthen the hands of all countries."<sup>36</sup>

The imprimatur of the British state and a sensational recommendation would have been enough in themselves to give Wolfenden formidable momentum on its release. We miss much of the potential impact of the report's international influence, however, if we overlook its method of justification. Leading with a jurisprudential contention largely beyond the scope of its evidence,

---

<sup>34</sup> Frank Mort, "Mapping Sexual London: The Wolfenden Committee on Homosexual Offences and Prostitution," *New Formations* 37 (1999), 92-113; Mort, *Capital Affairs*, 139-97; Deborah Cohen, *Family Secrets: Living with Shame from the Victorians to the Present Day* (Viking: London, 2013), 174-7.

<sup>35</sup> Letter, W. C. Roberts to John Wolfenden, 5 November 1955, HO 345/2, BNA. Interview with Home Office and Scottish Office, 15 October 1954, HO 345/12, BNA. William Wells to John Wolfenden, 29 February 1956, HO 345/2, BNA. Federal Republic of Germany file (April 1956), Netherlands file (April 1956), Sweden file (May 1956), HO 345/9, BNA. [Will add reference to own work here].

<sup>36</sup> International Committee for Sexual Equality, bulletin, July 1955, 4. Interview with Alfred Kinsey, 29 October 1955, HO 345/9, BNA. Desmond Curran to Alfred Kinsey, 5 December 1955, Institute Correspondence Files, Kinsey Institute (hereafter KI). "Notes on His European Trip of Late 1955 Dictated by Dr. Kinsey at Staff Meetings," 1/IB/1, Alfred Kinsey Papers, KI.

the committee asserted that it was not “the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior” further than was necessary to preserve public order, punish the obscene, and protect the vulnerable.<sup>37</sup> This reflected a utilitarian position, based on public good rather than individual rights, but it was also a principle that might seem effectively to mandate decriminalization, rather than simply favoring it on balance. Witnesses could protest that homosexual behavior directly menaced the health of society, damaged family life, and promoted the seduction of children, or that law reform would open “the floodgates” of license. But since the committee concluded they hadn’t proved this, the report’s jurisprudence compelled the statement for which it became most famous:

*There remains one counter-argument which we believe to be decisive, namely, the importance which society ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.*<sup>38</sup>

By deploying the expression “private morality and immorality,” the report emphasized the impossibility of evading moral reckoning while crucially advancing a stark separation of morality and law. The policing of homosexuals transgressed this separation in egregiously invasive ways. Private homosexuality, however defined, would need to cause palpable social harm to fall foul of the principle. Following the ICSE’s memo, the committee went so far as to ask the Dutch embassy whether homophile clubs in the Netherlands constituted a public nuisance, but learnt that police there believed such legitimization of adult contacts lowered delinquency. More cautious, the Wolfenden Report drew up privacy narrowly, suggesting strong spatial conditions and an extent bounded by two people, with street walking providing the contrast as a clear public nuisance.

Once again, this top-down delineation of privacy did not consider itself to redistribute power in the form of a right to gay men; nevertheless, the acknowledgement of private sanctuary around the previously criminalized could be suggestive of such when seen through different interpretive eyes. Just as the Wolfenden Report’s reasoning stood un beholden to whatever law reform preferences witnesses advanced once it had rejected their assertion of harm, so the aspiring universalism of its privacy principle easily detached from the nation.<sup>39</sup>

In Britain, the immediate impact of this “vice report” was sensational, but the path to homosexual law reform was slow, with advocates appealing to British “civilized” values above rights. When in 1960 Parliament first debated Wolfenden’s proposals on homosexual offences, the first (and almost only) mention of rights was by an opponent of reform who—far from invoking individual protections against the state—asserted that “[s]ociety has certain rights and standards which it is entitled to enforce,” including the “right as a country to do all we can within humanity to discourage homosexuals.” One advocate did urge the Commons to “be jealous of the rights of minorities,” but the final call for reform warned instead of the risk Parliament would take standing

---

<sup>37</sup> *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution* (Authorized American Edition, Stein and Day: New York, 1963), 23-4.

<sup>38</sup> *Ibid.*, 48.

<sup>39</sup> W. C. Roberts to British Foreign Office and Dutch Ministry of Foreign Affairs, 15 November 1955, HO 345/9, BNA. Dutch Ministry of Foreign Affairs, memo [undated, 1955 or 1956], HO 345/9, BNA.

“against the general current of civilised world opinion.” The motion was defeated 213 to 99 and Parliament did not pass Wolfenden-style legislation until 1967. Meanwhile, the Homosexual Law Reform Society (HLRS) lobbied predominantly against an ill-functioning law that promoted arbitrary prosecutions, blackmail, and suicide rather than the unjust transgression of rights.<sup>40</sup>

Long before British law reform, however, strong transatlantic currents transported Wolfenden to the United States, where the criminalization of sodomy was paired to a rights culture prone to reading the report differently. Indeed, those US homophiles who asked whether the report was “a Magna Carta for homosexuals” followed the American Bar Association’s unusual move to hold its annual conference in London in the summer of 1957, whereupon it gifted the British a monument commemorating the “great charter of liberties.” This it described as “the first effective written statement of that concept of individual liberty under law which is basic to Anglo-American jurisprudence,” a fundamental principle now safely enshrined in the US Constitution.<sup>41</sup> US newspapers gave prominent play to the conference attended by 3,000 lawyers and three Supreme Court justices, including Chief Justice Earl Warren, who in one of the recent “Red Monday” cases had affirmed a right of personal freedom that curbed congressional power to investigate an individual’s private affairs.<sup>42</sup> US advocates rhapsodizing over England as the font of legal liberty were soon chased back across the ocean by the newly released Wolfenden Report, its privacy principle becoming subject to an interpretative community proud to know its own rights.<sup>43</sup>

Media coverage provided an important route for Wolfenden’s transatlantic transmission, aggregating over years to produce an ambient stateside presence. Initial US reports were fitful, but they also provided contrasting tones to sensationalist British counterparts and treated Wolfenden’s articulation of privacy itself as news. The second sentence of the *New York Times*’ initial story, for

---

<sup>40</sup> *Parliamentary Debates*, Commons, 29 June 1960, vol. 625, cols. 1453-514. John Wolfenden had previously employed such rhetoric himself when in a foreword to a book analyzing the report he praised the author’s “attitude of civilized tolerance which is far from being indifference.” Foreword by John Wolfenden in Eustace Chesser, *Live and Let Live: The Moral of the Wolfenden Report* (London: Heinemann, 1958), 7-8. The Homosexual Law Reform Society also employed a strong rhetoric of civilized tolerance in the first issue of its journal, *Man and Society*, the introduction comparing attempts to enforce public morality to “anti-Semitic legislation under the Nazis” and apartheid in South Africa, while J. B. Priestley’s opinion piece asked: “Why is Britain, once in the van of civilization, now lagging behind most European countries?” “Introduction,” *Man and Society*, Spring 1961, 2; J. B. Priestley, “Notes on a Bad Law,” *Man and Society*, Spring 1961, 28.

<sup>41</sup> All quoted in “U.S. Lawyers Give Britain Shrine To Magna Carta,” *Baltimore Sun*, 29 July 1957, 1-2. See also, for instance: “Queen to Fete U.S. Lawyers,” *Christian Science Monitor*, 7 June 1957, 1; “U.S. Bar in Tribute to Magna Carta,” *New York Times*, 29 July 1957, 7; and “British, American Bar Associations Dedicate Memorial to Magna Carta,” *Washington Post*, 29 July 1957, A1.

<sup>42</sup> *Watkins v. United States* 354 US 178 (1957).

<sup>43</sup> For a comparative analysis of British utilitarianism and US rights culture, see Alan Ryan, “The British, the Americans, and Rights” in Michael J. Lacey and Knud Haakonssen (eds.), *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991* (Cambridge: Cambridge University Press, 1991), 366-439. On the prominence of constitutional rights consciousness in the United States, see Hendrik Hartog, “The Constitution of Aspiration and ‘The Rights That Belong to Us All,’” *Journal of American History* 74:3 (1987), 1013-34. For an analysis of the ways in which US liberal democracy expressed “itself indeed in a more intensive way than in Britain as a ‘culture of rights’”—in particular through “the process of ‘constitutionalizing’ the rights of persons”—see Gerald Stourzh, *From Vienna to Chicago and Back: Essays on Intellectual History and Political Thought in Europe and America* (Chicago and London: University of Chicago Press: 2007), 309-11.

instance, drew direct attention to the broad division between law and morals that grounded the report's attitude to homosexuality, while a front-page subhead in the *New York Herald Tribune* directly stated the privacy rationale, with *Newsday* using the same United Press wire to quote the committee at length on the separation of law and private life. Many US publications continued to track British reactions and in doing so reiterated the privacy principle, a *Washington Post* editorial at the end of November summarizing the committee contention that "the private immoralities of British subjects are not the proper concern of lawmakers and law enforcers." Long-form "Letter from London" and opinion pieces extended Wolfenden's early impact, so that by the end of 1958 the *New Yorker's* British correspondent described the report to US readers as "famous."<sup>44</sup> As Parliament limbered up for debate on prostitution and then homosexuality, Wolfenden's stateside celebrity was bolstered by periodic media references, citations in books, and eventually commercial editions of the report itself.<sup>45</sup> US spins were not necessarily positive, of course, and when in late 1958 the *New York Times* ran a story on a Foreign Office aide held in London on a "morals charge," it positioned the report more as symptom than solution, using it to justify the claim that "homosexuality in Britain is a major social problem." Still, most commentators recognized a certain authority in the committee process, the San Francisco Bishop James Pike in 1961 citing the report approvingly during the first documentary on homosexuality to be broadcast on US television. Indeed, the report's reputation became such that its absence from a 1962 radio program on homosexuality could seem almost as notable as the novel inclusion of gay men. By the early 1960s, Wolfenden had established itself in the United States as a regular and even expected reference in newly prominent public discussions of homosexuality.<sup>46</sup>

Wolfenden's potential to promote a shift towards seeing sexual privacy as a right was even more clearly registered by a homophile subculture that had great interest in the US reception of the report, while lacking traction with the authorities.<sup>47</sup> Even if not articulating a "right to privacy" per se, many US homophiles quickly saw Wolfenden as assisting their assertion of a fundamental freedom to be gay behind closed doors. The *Mattachine Review* (whose very first cover in January 1955 quoted Jefferson on the potential need to alter constitutions) had published for years articles on civil rights, demands for individual privacy, and British developments before offering the November 1957 Magna Carta coverline. Future issues devoted extensive space to analysis of and reaction to the report, an interest that lesbian journal *The Ladder* shared despite Wolfenden's male-

---

<sup>44</sup> "Vice Law Reform Urged in Britain," *New York Times*, 5 September 1957, 30. "Britain Urged to Ease Laws on Homosexuals: Penalties for 'Offenses' Backed But Not for Behavior in Private," *New York Herald Tribune*, 5 September 1957, 1. "Britain Urged to Ease Laws on Homosexuals," *Newsday*, 5 September 1957, 7. "The Wolfenden Report," *Washington Post*, 30 November 1957, A10. Mollie Panter-Downes, "Letter from London," *New Yorker*, 13 December 1958, 122.

<sup>45</sup> Many US publications paid close attention to the enforcement of Britain's new Street Offenses Act on 15 August 1959. Among the most prominent British books with US releases was Charles Berg and Clifford Allen's *The Problem of Homosexuality* (New York: The Citadel Press, 1958), advertised in the *New York Times* and including a reproduction of the Wolfenden Report's recommendations on homosexuality.

<sup>46</sup> "British Aide Held on Morals Charge," *New York Times*, 21 November 1958, 10; *The Rejected*, National Education Television (San Francisco, CA: KQED, 11 September 1961); "Homosexuals Air Their Views Here," *New York Times*, 16 July 1962, 36.

<sup>47</sup> Despite this relative political weakness of homophile movement in the early postwar United States, the circulation of queer knowledge through homophile magazines and other means was consequential to community formation, itself a political process. See Martin Meeker, *Contacts Desires: Gay and Lesbian Communications and Community, 1940s-1970s* (Chicago: University of Chicago Press, 2006).

oriented approach to homosexuality.<sup>48</sup> Meanwhile, *ONE Magazine*—the most trenchant and widely read US homophile publication of the 1950s—had spent years scouring the Constitution for guarantees that might overturn “prejudiced, outmoded and unenforceable statutes” and fend off “waves of persecution during which...basic legal rights may be totally ignored.” It immediately recognized and applauded the report’s central statement that it was not “the function of the law to intervene in the private lives of citizens” as bolstering its case (while also critiquing the implication that private homosexuality was immoral).<sup>49</sup> And the Wolfenden Report’s superlative significance to homophile assertions of a legitimate and rights-bearing homosexual identity is also conveyed by its sustained prevalence in US homophile circles, with Britain’s failure to enact law reform barely diminishing the document’s symbolic significance. By 1963 Wolfenden possessed such iconic status in the movement that a further homophile article on the report held that it had been “so widely discussed” that “to analyze or summarize its contents here would be tautology to an extreme.” Still, it went on: “Never has there been a more comprehensive, a more exhaustive, a more deliberately thorough, nor more emotionally detached examination of homosexuality and society, in general, and homosexuality and the law, in particular, than is contained in this report.” Wolfenden would continue to hold sway as the homophile movement entered a new phase of assertive activism signified by the “civil rights and social liberties” theme of a 1964 conference organized by East Coast homophiles.<sup>50</sup>

Other parties invested in sexual regulation had greater political potential to amplify the Wolfenden effect than marginalized homophiles, even if they were less prone to blur the report’s import with rights claims. The American Law Institute (ALI)—which brought together judges, lawyers, and scholars in a project to rationalize the criminal law—was one such locus of legal reform energy. The American Civil Liberties Union (ACLU)—with a history of fighting birth control restrictions through First Amendment grounds of free speech—was another. While on Wolfenden’s publication the latter remained reticent about viewing homosexuality as a civil liberties issue, the former had by 1955 already removed sodomy laws from the tentative Model Penal Code it was drafting as a blueprint for US states (a fact brought to the Wolfenden Committee’s attention by lawyers associated with Britain’s Labour Party). Yet if the ALI’s provisional revision shows that many US legal minds could imagine decriminalizing sodomy by the mid-1950s, it also proved a fiercely contested point of controversy.<sup>51</sup>

---

<sup>48</sup> There are too many references to the Wolfenden Committee and Report in homophile publications usefully to list them here. Anticipation was raised among US homophiles before the report’s release by publication of various witness statements, including those by British Medical Association and the Magistrates’ Association, which encouraged the expectation that the Committee would decriminalize private homosexual relations. Subsequent British media coverage of the report provided homophile editors with a much-exploited pool of talking points and reprints.

<sup>49</sup> Lyn Pedersen, “An Open Letter: Do Constitutional Guarantees Cover Homosexuals?” *ONE Magazine*, January 1956, 6-11. Don Slater editorial, *ONE Magazine*, December 1957, 3-4.

<sup>50</sup> Marcel Martin editorial, *ONE Magazine*, May 1963, 4. Although during 1963 HLRS’s journal *Man and Society* began to bear stronger resemblance to homophile magazines elsewhere, the organization formally maintained its distance from the international homophile movement. Britain’s first public homophile organization, the Minorities Research Group, was founded that year but aimed exclusively at women, since British law criminalizing homosexuality applied only to men. On HLRS, see David Minto, “Mr Grey Goes to Washington: The Homophile Internationalism of Britain’s Homosexual Law Reform Society” in Brian Lewis (ed.), *British Queer History: New Approaches and Perspectives*, 219-43.

<sup>51</sup> Interview with Society of Labour Lawyers, 27 July 1955, HO 345/13, TNA. On the ALI’s debates, see Marie-Amelie George, “The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the

Wolfenden helped change this political calculus. As recently as January 1957 the ACLU had formally adopted a statement recognizing that “overt acts of homosexuality constitute a common law felony and that there is no constitutional prohibition against such state and local laws.” Wolfenden, though, implicitly challenged its whole vision that legislative judgments as to the criminality of sexual and reproductive acts (including abortion) were beyond its own concerns, justified as reflections of community attitudes. By May 1958, the ACLU’s legal director Roland Watts discussed the report with a gay man fired from his job, labeling Wolfenden’s privacy position “the enlightened view,” even as he conceded that the ACLU “has not yet seen fit” to take laws to the contrary as “an invasion of an individual’s civil liberties so as to warrant our intercession.” Watts directed the man to homophile groups instead. But the tantalizing “not yet” itself indicated the pressure Wolfenden’s privacy principle applied, which Watts turned on his ACLU colleagues and the ALI’s leaders. Indeed, days after receiving the gay man’s letter, he upbraided the Model Penal Code drafters for not strengthening their position in favor of decriminalizing private, consensual sexual conduct.<sup>52</sup> By this point, the ALI leadership were well aware of Wolfenden’s impact in Britain, its director (who had attended the ABA’s London conference) telling a co-drafter that the “London papers were full of it.”<sup>53</sup> When in 1961 Illinois became the first US state to revoke its sodomy law through penal code reform similar to the ALI’s blueprint, the state drafting subcommittee acted partly under Wolfenden’s influence. The next year, when the ALI finalized the Model Penal Code, its co-drafter justified the absence of sodomy prohibitions to fellow lawyers as having “the support of the famous Wolfenden Report.”<sup>54</sup>

These discussions among advocates and reformers for the most part fell short of invoking a “right to privacy,” yet under Wolfenden’s influence such a locution was becoming more possible. Hence the significance of ACLU legal counsel Melvin Wulf’s ostensible refusal in March 1959 to be drawn on whether the organization might change its position on homosexuality as a civil liberty “in light of the English Wolfenden Report.” Here, before his own involvement in the unreasonable search claim of *Mapp v. Ohio*, Wulf acknowledged that “the attitude towards the right to privacy reflected in the Wolfenden Report is evidence of a growing social uneasiness concerning the intrusion of the state into the private behavior of its citizens.” The Wolfenden Report in this correspondence had prompted a clear articulation of a “right to privacy”—this from a man who, in drafting the ACLU’s amicus brief for the case preceding *Griswold*, soon pressed the Supreme Court to see a similar protection in the US Constitution.<sup>55</sup>

---

United States,” *Journal of the History of Sexuality* 24:2 (May 2015), 225-61. On the ACLU’s transition, see Wheeler.

<sup>52</sup> Rowland Watts to Francis Ruland, 13 May 1958, Folder 11, Box 1127, ACLU Papers, Mudd Library, Princeton University (hereafter MLPU). Watts to Louis Schwartz, 9 May 1958, Box 345, ACLU Papers, MLPU and quoted in Wheeler, 111-2.

<sup>53</sup> Herbert Goodrich to Louis Schwartz, 24 October 1957, 2/16, ALI Papers, University of Pennsylvania Biddle Law Library.

<sup>54</sup> Louis B. Schwartz, “Model Penal Code: An invitation to Law Reform” *American Bar Association Journal*, May 1963.

<sup>55</sup> Melvin Wulf to J. D. Mercer, 25 March 1959, Folder 6, Box 779, ACLU Papers, MLPU.

Both national press coverage of Wolfenden and particular activist responses to it made important contributions to legitimizing sexuality as a civil liberties issue. Yet somewhere between these two scales, Wolfenden seeded another atmosphere precipitating constitutional privacy, with law journals and law schools registering an important shift in the legal surrounds to Supreme Court decision-making. Indeed, in the years before *Griswold* Wolfenden's central concerns percolated steadily through US law reviews, complementing the detailed assessments of British counterparts, with journals from Alabama to Yale referencing the report in long-form articles or short book reviews. Sensational subject matter paired with jurisprudential pointedness fired legal minds in both targeted and expansive ways. Substantive, procedural, and philosophical concerns all fed the legal system context for privacy's imagination as a right.<sup>56</sup>

Even in discussions of homosexuality and prostitution, legal commentators often viewed Wolfenden as more than a technical policy document or menu of legislative upgrades—a quality they sometimes contrasted to the ALI's model penal code. For instance, in a themed 1960 issue of Duke's *Law and Contemporary Problems* on sex offenses that cited Wolfenden several times, one contributor stressed that it was “important, even vital, to keep abreast of British developments as we carry on our American discussion of sex ethics and sex law.” Indeed, this writer, found that while the ALI draft recommendations “lean heavily in the direction of the English ones...[they] seem to lack the sharp edge and clarity we need to reach and explore the issues at stake.” Meanwhile, an article in the *Ohio State Law Journal* taking aim at the local sexual psychopath law described Wolfenden as an epochal reframing of manners and morals in which “the age admits the defects of the extant social order and is led toward a more enlightened approach in the area examined.” While these US commentators expressed few qualms cheerleading for a British report they associated with a rational approach to sexual ethics and regulation, Wolfenden's influence went beyond those already supporting its policy recommendations. One Nebraskan legal scholar writing in a national periodical held that the report's most important effect was its “signal contribution to the realm of popular ideas about the real functions of the criminal law.” The quantity of citations and the quality of praise began to resemble something of an incipient paradigm shift rebalancing private lives, community morality, and law.<sup>57</sup>

A sign and powerful stimulant of this transpired with a British legal debate inspired by Wolfenden's privacy principle that quickly attained transatlantic proportions. On one side stood High Court judge Patrick Devlin, who had given evidence to the committee and cited it in the published version of lectures he gave at Yale Law School in September 1957.<sup>58</sup> Devlin's stellar stateside reputation was such that Chief Justice Warren and other Supreme Court justices travelled to Connecticut to hear him speak, while the American College of Trial Lawyers

---

<sup>56</sup> See, for instance: Gerhard O. W. Mueller, “Criminal Law and Administration,” *New York University Law Review* 34:1 (January 1959), 83-116; Francis A. Allen, “Criminal Justice, Legal Values and the Rehabilitative Idea,” *Journal of Criminal Law, Criminology and Police Science* 50:3 (September 1959), 226-32; James Melvin Reinhardt, “A Critical Analysis of the Wolfenden Report,” *Federal Probation* 23:3 (September 1959), 36-41; Stanton Wheeler, “Sex Offenses: A Sociological Critique,” *Law and Contemporary Problems* 25:2 (Spring 1960), 258-78; and Samuel M. Fahr, “Why Lawyers are Dissatisfied with the Social Sciences,” *Washburn Law Journal* 1:2 (Spring 1961), 161-175.

<sup>57</sup> Joseph Fletcher, “Sexual Offenses: An Ethical View,” *Law and Contemporary Problems* 25:2 (Spring 1960), 249; Phillip E. Stebbins, “Sexual Deviation and the Laws of Ohio,” *Ohio State Law Journal* 20:2 (Spring 1959), 346; James Melvin Reinhardt, “A Critical Analysis of the Wolfenden Report,” *Federal Probation* 23:3 (September 1959), 38.

<sup>58</sup> Patrick Devlin, *The Criminal Prosecution in England* (New Haven: Yale University Press, 1958).



published—with the apparent backing of Justice Frankfurter—Devlin’s summation of a highly publicized British murder trial as a model for its members.<sup>59</sup> Devlin thus had acquired a distinctive fame among US lawyers when he used a 1958 British Academy lecture to reject Wolfenden’s separation of morality and law, arguing instead that society legitimately criminalized acts for which a reasonable man felt “intolerance, indignation and disgust”. Indeed, for Devlin’s natural law vision of a cohesive Christian society the suppression of vice bore comparison to the suppression of treason. And in Britain, treason already had a distinctly queer air given the recent exposure in multiple senses of Soviet spies Guy Burgess and Donald Maclean.<sup>60</sup>

On the debate’s other side stood Oxford Professor of Jurisprudence Herbert Hart, who took up Wolfenden’s part against Devlin’s assault. While less prominent than Devlin, Hart’s star among US legal scholars had risen when he delivered a striking defense of legal positivism through the prestigious Holmes Lecture at Harvard in April 1957. His insistence there on separating “what the law actually is” from normative claims of “what the law should be” prompted a famous response from Lon Fuller, Harvard’s foremost advocate of natural law, their exchange acquiring legal celebrity in part through a dramatic disagreement over the status of Nazi law in postwar Germany.<sup>61</sup> The subsequent Hart-Devlin debate developed from a similar mix of far-reaching philosophical principles, lively political implications, and striking rhetoric. Delivered over BBC radio, Hart’s opening salvo picked up on Devlin’s comparison of the suppression of vice to suppression of treason. While Western Cold War public culture was prone to conflate homosexuality and subversion, Hart’s attack on Devlin’s absurd invocation of “private treason” channeled British liberal reaction to the invasiveness of such Lavender Scares.<sup>62</sup> Personal as well as political and intellectual concerns likely motivated the intervention; in the 1930s, Hart had confessed an angst-ridden attraction to men while courting his wife. But while this anxiety continued to manifest itself in private diaries, it left only faint—or indeed penumbral—traces in Hart’s public writing.<sup>63</sup>

Legal commentators who straddled the Atlantic quickly indicated their sense of the emerging Hart-Devlin debate’s jurisprudential heft, assisted by Anglo-American institutional ties. While Yale Law School Dean Eugene Rostow confusedly attempted to rescue Devlin for US liberals from a number of assailants,<sup>64</sup> a commentator writing on “The British Experience” in *Law*

---

<sup>59</sup> Patrick Devlin, “The Trial Judge,” *Connecticut Bar Journal* 31:4 (December 1957). *Summing Up of the Honourable Mr. Justice Devlin* (American College of Trial Lawyers, 1957). A review of Devlin’s later book *The Enforcement of Morals* (London and Toronto: Oxford University Press, 1965) by a US district court judge recalled that “[Devlin’s] summing-up in the trial of Dr. John Bodkin Adam so much excited the admiration of Justice Frankfurter that, to meet his request, Lord Evershed persuaded the Treasury to have the summation transcribed, and the United States Supreme Court supplied copies as models to trial judges.” Review, Charles Edward Wyzanski, Jr., *University of Toronto Law Journal* 16:2 (1966), 455-61.

<sup>60</sup> Patrick Devlin, *The Enforcement of Morals* (London and New York: Oxford University Press, 1968), 17.

<sup>61</sup> Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004), 197-202.

<sup>62</sup> H.L.A. Hart, “Immorality and Treason,” *Listener*, 30 July 1959, 162-3.

<sup>63</sup> Although Lacey’s formidable biography sometimes downplays Hart’s homoerotic attractions, perhaps in deference to Hart’s wife and children, it provides considerable evidence of their significance to him. See Lacey, 61-2, 73-6, 194, 203-5.

<sup>64</sup> Eugene Rostow, “The Enforcement of Morals,” *Cambridge Law Journal* 18:2 (November 1960), 174-98. Rostow stated that the paper developed through invited talks at British universities during the previous academic year, including a lunch with Hart and guests at Oxford. Another early participant highlighting Anglo-American legal ties was Norman St. John-Stevan, A British scholar who developed his book *Life, Death and the Law: Law and*

and *Contemporary Problems* had by 1960 clearly identified the main positions and protagonists.<sup>65</sup> Soon after, a March 1961 *Yale Law Journal* article on “Private Consensual Homosexual Behavior” drew on Wolfenden and Hart-Devlin to analyze a District of Columbia indecency case in which a man was, in effect, entrapped in his own home, citing a substantial number of British sources coalescing into an “enforcement of morals” debate.<sup>66</sup> US interest indeed extended the encounter and helped to establish it as a distinctive phenomenon, with Devlin and Hart both delivering named lectures at US law schools. The Hart-Devlin debate was a pronouncedly transatlantic production in its questioning of how community moral standards related to criminal law, where potential state transgressions of individual freedom were so pronounced.<sup>67</sup>

As the terms of debate settled, the Supreme Court decision in *Poe v. Ullman* further inspired activists about privacy’s potential constitutional career. The court, as we saw, declined to overturn a Connecticut statute banning contraception usage and privacy played only a small role in the appellant’s argument. But the ACLU’s amicus brief did stress “the right to privacy” and a dissent from Justice Harlan—who alongside Justice Douglas directly mentioned such a right—bore strong resemblance to Wolfenden’s thinking even as it drew an emphatic separation between marital privacy and homosexuality. To those lamenting that the court’s opinion saw an unripe case of “empty shadows,” dissents signaled a constitutional pathway forward if such a right could plausibly win more justices over.<sup>68</sup>

If it remains unclear in what precise ways the Supreme Court justices encountered Wolfenden, strong currents of Anglo-American legal exchange that reinforced imagined legal kinship also increased the chances of direct contact. Harlan, for instance, was a former Rhodes scholar who had rhapsodized at the ABA’s 1957 London meeting about the “common legal heritage and free political institutions” through which “we have each achieved a society free from enforced conformity, and dedicated to the protection of individual rights, habits, points of view and tastes.” In August 1960, he was among those to welcome 1,500 British lawyers—including Wolfenden’s instigator, the now Lord Chancellor—to Washington following the first Commons debate on the homosexual proposals.<sup>69</sup> Then, as the Supreme Court deliberated *Poe v. Ullman*, Harlan’s clerk spun off a memo arguing for marital privacy in constitutional language strikingly close to Wolfenden’s jurisprudential phraseology, even in implicitly disavowing the report’s policy conclusion. Acknowledging that it was not easy “to draw the line between public and private

---

*Christian Morals in England and the United States* (Bloomington: Indiana University Press, 1961) through fellowships from Yale Law School and the Fund for the Republic.

<sup>65</sup> J. E. Hall Williams, “Sex Offenses: The British Experience,” *Law and Contemporary Problems* 25:2 (Spring 1960), 356.

<sup>66</sup> “Private Consensual Homosexual Behavior: The Crime and Its Enforcement,” *Yale Law Journal* 70 (March 1961), 623-35 on *Rittenour v. District of Columbia*. In a sign of the interconnected stakes of the debate that some legal minds could see, this article notably cited an earlier unsuccessful challenge to Connecticut’s birth control statute, *State v. Nelson* 126 Conn. 412 (1940).

<sup>67</sup> The lecture Devlin delivered on 28 September 1961 at University of Pennsylvania Law School was published as “Law, Democracy, and Morality,” *University of Pennsylvania Law Review* 110:5 (March 1962), 635-49. Hart delivered the 1962 Harry Camp Memorial Lectures at Stanford University, published as *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963). It is worth underlining the implications of homosexuality’s prominent position in this lecture series dedicated to “the dignity and worth of the human individual.”

<sup>68</sup> For a discussion of the ACLU brief’s formulation of privacy that instead emphasizes its relation to illegal state seizure of evidence in *Mapp v. Ohio*, see Wheeler, 102-4. *Poe v. Ullman*, 367 US 497 (1961).

<sup>69</sup> Harlan, “Our Hosts” speech at Middle Temple Hall, 24 July 1957, Box 649, John Marshall Harlan Papers (hereafter JMHP), MLPU.

morality” without “casting doubt on laws against homosexuality, adultery, fornication, etc.,” the memo solved the problem by suggesting the special character of marriage—a “natural state” before being “a creature of the state”—versus “outright sexual intimacy” that remained unprotected.”<sup>70</sup> And so Harlan’s eventual dissent held that Connecticut’s prohibition transgressed without sufficient reason a “most fundamental aspect of ‘liberty’” as recognized “by common understanding throughout the English-speaking world.” When Justice Brennan—who had affirmed the majority rejection in *Poe*—spoke to London’s Law Society shortly after on the topic of privacy he led with the birth control decision, acknowledging he had “difficulty in imagining a more indefensible invasion of privacy than an invasion of the marriage chamber by the government.”<sup>71</sup> But the same circuits encouraging Anglo-American legal ties and imaginaries ensured Wolfenden’s queer intervention was never far away. In 1961 Brennan formed part of a seven-man delegation of US jurists to Britain as part of an Anglo-American project comparing English and US appellate court systems, and was received by a team including erstwhile Wolfenden Committee member Kenneth Diplock—the lawyer who had invoked Hitler’s homosexual attacks.<sup>72</sup> In 1962, Diplock repaid the visit, spending two days at the Supreme Court in close contact with the justices.<sup>73</sup>

Law journals, law school talks, and institutional exchange all brought Wolfenden’s privacy principle to US shores and affected the atmosphere of the legal system at large, increasing sexual privacy’s legibility prior to *Griswold*. But for privacy to be realized as a constitutional right, it was not sufficient for it to appear a reasonable intellectual proposition; in recalibrating morality’s claims on law, privacy must overcome political factors constraining judicial articulation. For one thing, while contraceptives were widely available in Connecticut drug stores, powerful Catholic opposition morally opposed to birth control made law reform itself an unappealing campaign issue for politicians. Should the Supreme Court cut through legislative deadlock over birth control on the basis of a fundamental right, it therefore risked backlash from not only those supporting a contraception ban, but also those who feared judicial intervention overriding democracy. While birth control as an issue lacked the explosiveness of racial desegregation, the Supreme Court’s 1954 *Brown* decision made any federal intervention in state politics a charged affair, perhaps especially when it came to the ultimate power of judicial review. Northern progressives alongside Southern resisters avidly monitored the Warren Court, the lead drafter of the ALI’s Model Penal Code accusing it of deviating from “neutral principles.” Invoking a right to privacy nowhere mentioned in the constitution invited another phrase rapidly gaining currency in US culture: judicial activism.<sup>74</sup>

---

<sup>70</sup> Bench memorandum in *Poe v. Ullman*, Folder “Re: Birth Control Issues,” Box 483, JMH Papers, MLPU.

<sup>71</sup> William Brennan, speech at Law Society, London, 10 July 1961, Folder “Re: Privacy,” Box 587, JMH Papers, MLPU.

<sup>72</sup> Delmar Karlen, *Appellate Courts in the United States and England* (New York University Press, 1963), 1-3. Justice Brennan provided a foreword to the book.

<sup>73</sup> “8 Britons Arrive to Observe Court,” *New York Times*, 15 January 1962, 24. “Judges’ Seminar to Open at NYU,” *New York Times*, 21 July 1963, 55. “Highest Court Holds U. of C. Session,” *Chicago Tribune*, 3 April 1964, A3.

<sup>74</sup> Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” *Harvard Law Review*, 73:1 (November 1959), 1-35. In *Lochner v. New York* 198 US 45 (1905), the Supreme Court struck down a state law regulating worker hours as a constitutional breach of freedom of contract, with Justice Holmes’ dissent a subsequently becoming a rallying cry among those liberals who deemed the court to have ruled on political grounds. For an analysis of the liberal dilemma over judicial restraint following *Brown*, see Morton J. Horwitz, “The Jurisprudence of *Brown* and the Dilemmas of Liberalism,” *Harvard Civil Rights-Civil Liberties Law Review* 14:3 (1979).

By the early 1960s any so-called discovery of a fundamental right risked antagonizing both popular and professional US critics of judicial legislation. In 1962 Alexander Bickel's *The Least Dangerous Branch* strikingly articulated the "countermajoritarian difficulty" of judicial review in democracy, providing theoretical heft to those charging judicial activism of all but the narrowest rulings.<sup>75</sup> And while Congress gave the Civil Rights Act of 1964 democratic endorsement, the authority of the federal legislature to enforce these measures remained fiercely contested. Reflecting this pressure was a widely publicized speech by Justice Harlan that summer, which—though opening with "Magna Carta, that famed fountainhead of individual liberty"—reassured those unsettled by recent legislation that there "is no such thing in our constitutional jurisprudence as a doctrine of civil rights at large standing independent of other constitutional limitations or giving rise to rights born out of the personal predilections of judges." He further concluded that "our federalism not only tolerates, but encourages, differences between Federal and State protection of individual rights". Harlan's words might render his own dissent in *Poe* vulnerable.<sup>76</sup>

But here the ongoing stateside dissemination of Wolfenden's privacy principle made a crucial difference—over and above long-term claims of tort privacy, which had not resulted in a constitutional right, and the obviously recent innovations in search and seizure protections. Although starting life as a call for homosexual law reform, Wolfenden's elaboration by Hart and others as a more general Anglo-American commitment to liberty in privacy helped provide enough of a seemingly neutral principle for the Supreme Court to surmount this significant hurdle.

Magnified by the powerful engine of US legal institutions, Hart's jurisprudential elaboration of his position was a particularly significant factor turning sexual privacy into a core, even traditional, legal principle. While responses to the British judge Devlin dominated the first stage of debate, Hart's February 1962 lectures at Stanford—published in 1963 as *Law, Liberty and Morality*—reversed the momentum, asserting a distinctive liberal philosophical vision. Targeting the harmful infringements of liberty caused by moralistic regulation of sexual lives, Hart glanced at a potential solution by noting that in the United States "the rights of individuals are protected to some extent from the majorities by a written constitution."<sup>77</sup> Until then, rights had not featured much in the exchange with Devlin, but the US context brought the term into Hart's remarks at a moment when African-American organizing forced a sharp spike in rights talk more generally.<sup>78</sup>

Rather than seizing on expediency, however, Hart's broadside undercut sexual morality laws through jurisprudential principles it argued were of fundamental character, with long traditions in Anglo-American law and society. While Devlin's tagline of "intolerance, indignation,

---

<sup>75</sup> Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).

<sup>76</sup> Harlan's speech on 9 August 1964 dedicating the "Bill of Rights Room" at the US Subtreasury Building in New York City was reported on the front page of the *New York Times* and reprinted in full in the *American Bar Association Journal* 50 (October 1964), 918-20. Harlan had been expressing his concern publicly for some time. See, for instance, "Government Power Balance Breaking Down, Harlan Says," *Buffalo Evening News*, 25 January 1964.

<sup>77</sup> Hart, *Law, Liberty, and Morality*, 6-17, 22, 77-81.

<sup>78</sup> One legal commentator explicitly criticized Devlin's confusing use of rights language applied to social attitudes rather than the protection of individuals. Graham Hughes, "Morals and the Criminal Law," *Yale Law Journal* 71 (1962), 672. Intriguingly, given Douglas's opinion in *Griswold*, "penumbras" was a key term of Hart-Fuller debate.

and disgust” became a lightning rod for critique of his whole position as contrary to “the Anglo-American concept of the individual as autonomous entity” (as one *Yale Law Journal* article put it, immediately citing the Wolfenden Report),<sup>79</sup> even those who judged Hart “as an ‘activist’ as well as a scholar” and complained about “special pleading” for homosexual law reform could admit he clarified thinking on law’s reach more generally. Tellingly, two significant criminal law textbooks published in 1962 prominently featured homosexual privacy and implicitly invited constitutional reappraisal, the field-shaping *Criminal Law and Its Processes* highlighting “the great issue of the reconciliation of the authority and the individual,” then opening with a section framed around Wolfenden and the Hart-Devlin debate. The strength of Hart’s impact is further indicated by his reception in Notre Dame’s *Natural Law Forum*—not the most likely venue to embrace the positivist Hart—where a reviewer praised his “restrained and subtle discussion” that was “outstanding in importance,” again quoting Wolfenden’s privacy principle while affirming that “[n]obody would assert that this Committee...was indifferent to the preservation of moral standards.” In these ways, restraining morality’s imposition through law could present itself as more faithful to the fundamental tenets of US society than statutes prohibiting sodomy, let alone birth control.<sup>80</sup>

A variety of advocates now drew on Wolfenden and Hart actively to forge connections between abstract privacy and applied constitutional protection. Those concerned by psychiatry’s encroachment on civil liberties, for instance, would find the Wolfenden Report prominently deployed in defense of constitutional protections by Thomas Szasz’s popular 1963 polemic *Law, Psychiatry, and Morality*, with its one-word flip of Hart’s title. That year legal scholar Louis Henkin (later a prominent US theorist of human rights) drew on the Hart-Devlin debate’s escalation in his prominent article “Morals and the Constitution.” Although focused on Supreme Court obscenity decisions, this piece not only drew links between privacy and the constitution, but also lobbied the Supreme Court to recognize them in practice. Its conclusion indeed forcefully deployed Wolfenden and Hart to call for constitutional intervention to protect civil liberties from the enforcement of morals:

*When we deal not with physical injury to ourselves but with “sin,” respectable and authoritative voices are increasingly heard that there exists “a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.” Should not the Supreme Court today, or tomorrow, consider whether under the Constitution some morality, at least, may be not the law’s business and not appropriate support for legislation consistent with due process of law?*

Quoting the Wolfenden Report, Henkin trumpeted “the philosophers” and portentously remarked that if “the court will not look afresh at obscenity laws, particularly in its private aspects,”

---

<sup>79</sup> “Private Consensual Homosexual Behavior: The Crime and Its Enforcement,” *Yale Law Journal* 70, (Spring 1961), 627. Devlin’s preface to *The Enforcement of Morals* (London: Oxford University Press, 1965) struck a defensive note in reacting to the controversy of his phrase at viii-ix.

<sup>80</sup> Robert S. Summers, review, *New York University Law Journal* 38:6 (1963), 1201-13; Monrad G. Paulsen and Sanford H. Kadish, *Criminal Law and Its Processes: Cases and Materials* (Boston: Little, Brown, 1962); W. Friedman, review, *Natural Law Forum* 9 (1964), 151-4.

perhaps it would do so in birth control cases.<sup>81</sup>

Wolfenden, Hart, and their transatlantic legacies had made a difference in how fundamental a right to privacy might seem. Although the Supreme Court would exclude so stigmatized a practice as gay sex from that realm, a sharp increase in homosexuality's prominence as a discussion point in US culture ensured Wolfenden's continued topicality immediately before *Griswold*. *LIFE*'s groundbreaking 1964 feature on "Homosexuality in America" was far from unusual in referring to the now seven-year old report directly.<sup>82</sup> Homophiles, meanwhile, continued to deploy it to secure allies. Indeed, the Daughters of Bilitis research committee chairwoman put Wolfenden top of the list when in February 1965 lesbian activist Barbara Gittings asked for references to take to a meeting with an ACLU representative that "will give strong support for this possible ACLU statement to pull down the government's barriers to full equality for homosexuals." Consequently, political opponents were also forced to grapple with Wolfenden, as the New York Academy of Medicine did in 1964 and the federal Civil Service Commission would do two years later.<sup>83</sup> In between, as the justices limbered up to hear oral arguments in 1965, they may have seen a new series on homosexuality on the front page of the *Washington Post*, which noted that there had "been much 'cry Wolfenden' since the British Parliament received the report." They may not have done, of course. Yet Wolfenden's public presence in the United States had made a signal contribution to crystalizing a pressing question percolating through culture and channeled by the *Post* as: "Should law reach into the bedroom and the area of private morals?"<sup>84</sup>

Estelle Griswold's legal team wisely offered the Supreme Court a range of grounds on which to intervene, but privacy now anchored their main argument. Given Harlan's warning shot regarding the right's bounds, homosexuality and Wolfenden remained unmentioned and the menu of judicial remedies even suggested striking down the law on the basis that its implied moral position was outside the majority views in the community. But the main brief ultimately urged a more "fundamental" solution, concluding that the court had likely never had a statute before it "which touched so drastically and so arbitrarily upon so many fundamental rights of the citizen." It followed this claim with a long, rousing section on a constitutional right to privacy that, while grounded in the site of the marital home, countered more than physical invasion, appealing to a protected realm of private—albeit normative—morality. It was "the sanctity of the home," the brief argued, where "'the right to be let alone' becomes most meaningful and precious". This and the "wholly personal nature of marital relations" formed "the inner core of the right to privacy."

---

<sup>81</sup> Thomas Szasz, *Law, Liberty and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices* (New York: Macmillan, 1963), 245, 249. Louis Henkin, "Morals and the Constitution: The Sin of Obscenity," *Columbia Law Review* 63:3 (March 1963), 413-4.

<sup>82</sup> The recently founded Stein and Day published the hardback edition in 1963, adding an introduction by the psychiatrist Karl Menninger to otherwise verbatim text. The more luridly pocket back was released the year after. *The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution* (New York: Lancer Books, 1964). Paul Welch, "Homosexuality in America," *LIFE Magazine*, 26 June 1964, 74.

<sup>83</sup> The Daughters of Bilitis's Gittings to Conrad, 12 Feb 1965, and Conrad to Gittings, 16 Feb 1965, 59/6, Barbara Gittings Papers (hereafter BGP), New York Public Library (hereafter NYPL). New York Academy of Medicine, Committee on Public Health, *Homosexuality: A Report* (1964). John W. Macy, Chairman of Civil Service Commission, to Mattachine Society of Washington, 25 February 1966, Frank Kameny Papers (online), Library of Congress

<sup>84</sup> Jean M. White, "49 States and the District Punish Overt Homosexual Acts as Crimes," *Washington Post*, 3 February 1965, A1. Jean M. White, "Those Others: A Report on Homosexuality," *Washington Post*, 31 January 1965, E1.

Supplemented by an ACLU amicus brief that once again stressed a right to privacy protecting (in Brandeis's words) "Americans in their beliefs, their thoughts, their emotions, and their sensations," the legal team emphasized that Connecticut's moralistic statute threatened "the fundamental rights of privacy of married couples." Its lead lawyer in oral arguments further asserted a "field where the individual is entitled to some private sector against which government is forbidden to intrude" that was more of a decisional than a physical domain. Protecting a "right to decide whether to have children voluntarily," it encompassed—for married couples, at least—the choice to have sex that did not lead to procreation, no matter what the community thought.<sup>85</sup>

Enough had happened since *Poe* to incline the Supreme Court to see a right to privacy as a reasonable path. Historians and legal scholars are prone to fetishize the judicial archive of Supreme Court decisions, and *Griswold*'s has been mined more than most. But while conference records, memos, and multiple drafts of the majority decision all testify to the contingencies of this ruling, they only reveal so much about the shifting atmosphere enabling sexual privacy's identification and articulation.<sup>86</sup> By making a right to privacy more intuitive in US legal circles and even broader publics, the transatlantic vector of Wolfenden's privacy paradigm played a critical if somewhat covert role in rendering *Griswold* conceptually and politically plausible. In this light, the decision's famous encomium to marriage (written by multiple divorcee Justice Douglas) seems less a straightforward reflection of its age than a reflex establishing distance from a suspect heritage, for which it substituted the supposedly timeless value of marital intimacy. Locating the "zone of privacy" in the "penumbras" of "several fundamental constitutional guarantees," the court not only avoided binding itself too closely to any particular line of cases that could dictate future decisions, but also covered the tracks of its jurisprudence. Three of the four justices joining Douglas's majority opinion nevertheless felt enough discomfort with its "emanations" to sign on to a concurring opinion that specifically cited Harlan's remarks in *Poe* on homosexuality. Regardless of whether the justices self-consciously sensed Wolfenden lurking in *Griswold*'s penumbras, the rhapsodic praise of marriage and explicit exclusion of homosexuality indicated why this US constitutional right did not constitute a "realm of private morality and immorality" extending even so far as contraceptive use by unmarried couples, let alone other "perversions."<sup>87</sup>

Onlooking lawyers though quickly apprehended sexual privacy's potential to burst beyond marital bedrooms. The *Harvard Law Review* commented on *Griswold*'s bearing on broader sexual liberties directly after the decision.<sup>88</sup> A little later, the appellant's lead lawyer speculated that, over time, "all sexual activities of consenting adults will be brought within the right of privacy."<sup>89</sup> A 1966 *UCLA Law Review* study on the policing of homosexuals thought that "*Griswold* may foreshadow eventual judicial recognition of the right of consenting adults to engage privately in

---

<sup>85</sup> Appellate Brief, *Griswold v. Connecticut*, 381 US 479 (1965). Brief for ACLU as Amicus Curiae, *Griswold v. Connecticut*, 381 US 479 (1965). Thomas Emerson, 29 March 1965, oral argument before Supreme Court in *Griswold v. Connecticut* in Roy M. Mersky and Jill Duffy, *A Documentary History of the Legal Aspects of Abortion in the United States: Griswold v. Connecticut* (Littleton: Fred B. Roth Publications, 2001).

<sup>86</sup> Garrow's account in *Liberty and Sexuality* provides the most comprehensive account of the Supreme Court's backroom machinery in this case. For a helpful analysis of doctrinal innovation that facilitated the form of Douglas's majority opinion (but does not mention Wolfenden or Hart-Devlin), see Ryan C. Williams, "The Paths to *Griswold*," *Notre Dame Law Review* 89:5, 2155-88.

<sup>87</sup> *Griswold v. Connecticut*, 381 US 479 (1965).

<sup>88</sup> "The Supreme Court, 1964 Term," *Harvard Law Review* 79 (1965), 103. See Thomas C. Grey, "Eros, Civilization and the Burger Court," *Law and Contemporary Problems* 43:3 (Summer 1980), 83-100.

<sup>89</sup> Thomas I. Emerson, "Nine Justices in Search of a Doctrine," *Michigan Law Review* 64:219 (1965), 219-34.

any form of sexual behavior.”<sup>90</sup> Meanwhile, a lawyer giving a presentation at a San Francisco homophile group called the Society for Individual Rights asked his audience to consider whether *Griswold*’s “zone of privacy” extended to them.<sup>91</sup>

Homophile leaders disagreed on this question and some harbored significant doubts about the politics of privacy itself. While homophile magazine editor Clark Polak was optimistic about *Griswold*’s implications for the movement, fellow activist Barbara Gittings believed “that homosexuals are far more likely to suffer from laws that allow authority to restrict homosexuals’ assembly and communication than from laws against specific sex acts.”<sup>92</sup> Furthermore, although Gittings acquired Hart’s *Law, Liberty, and Morality*—lending it out to fellow homophile trailblazer Frank Kameny—she also apparently underlined a 1965 review asserting that Hart was “deeply a conservative” and “ready to tolerate deviant sexual behavior, kept discreetly from public view, because, and to the extent that, it does not jeopardize the legal system and the basic social establishment”.<sup>93</sup> In San Francisco, the lawyer lecturing homophiles in *Griswold*’s wake quickly moved from privacy to other concerns, including “the sex psychopath issue” and the policing of homosexuals by easily prosecuted misdemeanors.<sup>94</sup> And in New York, the chair of the Mattachine Society’s legal committee, enthusiastically noted the new likelihood in England of “fundamental legal reform” based on the Wolfenden Report, but directed more attention to a US test case regarding the legality of gay bars and to new solicitation provisions that he feared would increase homosexual arrests.<sup>95</sup> Indeed, perhaps the biggest irony of Wolfenden’s Atlantic crossing was that its essential division between decriminalizing private homosexuality while increasing penalties for female streetwalking might in the United States lead to the revocation of sodomy laws that caught few gay men while strengthening solicitation statutes that caught many.<sup>96</sup>

Yet *Griswold* also brought out why Wolfenden remained a political weapon of unsurpassed stature in US homophile politics. When *TIME* in January 1966 acknowledged the report to be “invariably the model cited,” it rejected Wolfenden’s advocates in part by lamenting the “pathetic little pseudo marriages in which many homosexuals act out conventional roles.” Homophile activist Frank Kameny hit back, defending the privacy principle against brutally penalizing “adults who have engaged in private, consensual sexual acts, or acts of love, which have no adverse consequences”. Where *TIME* in effect placed emphatic distance between gay relationships and the “sacred” bond *Griswold* now protected, Kameny’s defense of Wolfenden drew a pointed connection between “private, consensual sexual acts” and “acts of love”.<sup>97</sup> If Wolfenden promoted gay civil liberties at the expense of legal moralism, it also—and for better or worse—performed its

---

<sup>90</sup> “The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County—Part 1: The Introduction,” *UCLA Law Review* 13:3 (March 1966), 644.

<sup>91</sup> Lecture by William Parker, July 1966, 60/16, BGP, NYPL.

<sup>92</sup> Clark Polak quoted in Eskridge, *Dishonorable Passions*, 143-4. Barbara Gittings to Richard Inman, 26 October 1965, 59/4, BGP, NYPL.

<sup>93</sup> Henry Clay Aiken, “There Oughta Be a Law,” *New York Review of Books*, 11 November 1965. Underlined copy in 97/1, BGP, NYPL.

<sup>94</sup> Lecture by William Parker, July 1966, 60/16, BGP, NYPL.

<sup>95</sup> Arthur C. Warner (as Austin Wade), “Annual Report of Chairman of Legal Committee 1965-1966,” 30 June 1966, 4, Mattachine Society Legal Folder, Arthur C. Warner Papers, MUPL.

<sup>96</sup> As Wheeler notes, some homophiles criticized the ACLU’s new 1967 commitment to defend private behavior between consenting adults for failing to cover arrests for solicitation rather than sodomy, which Frank Kameny perceived to comprise the “overwhelming majority of arrests of homosexuals.” See Wheeler, 156-7.

<sup>97</sup> “The Homosexual in America,” *TIME*, 21 Jan 1966; and “Letters *TIME* Didn’t Print,” *Ladder*, April 1966, 22-4.



own boosterism for the private sphere. For many in the postwar homophile movement, privacy's equation with intimacy spoke to some deeply felt desire for public validation of personal lives and feelings. Beyond *Griswold*'s constitutional recognition of privacy, what *TIME* dubbed "The Wolfenden Problem" spoke to them about more than rights.

When Oliver Wendell Holmes argued in 1873 that it was better to draw a line "somewhere in the penumbra between darkness and light, than to remain in uncertainty," the metaphor he promoted begged its own annihilation. Divergent patterns of legal precedent unleashed shadowy gradients of ambiguity; clear bright lines, applied by justices, drew towards resolution.<sup>98</sup>

*Griswold*'s shadow play, however, came freighted with a different implication: that penumbras themselves might inhabit—and be deployed by—judicial articulations. If creeping darkness was unsettling, it also proved powerful when deliberately sustained. During his subsequent Supreme Court career, Holmes cast words comprising the US constitution as "the skin of a living thought," rather than as transparent and unchanging crystals, and his perception of constitutional penumbras came to justify rights made out by implication.<sup>99</sup> By early 1973, the court had extended a penumbral "right to privacy" beyond married couples to contraceptive use by single people and to abortion.<sup>100</sup> Controversy, of course, continued to attach itself to such shadow agency, both in regard to its jurisprudential operation and to particular un-enumerated rights. Critics also attacked privacy's limited or skewed intervention in power dynamics.<sup>101</sup> Even supporters of the right to privacy as applied to sexual and reproductive politics disagreed over how the light and shade fell or could feel discomfort about the precariousness of such shadow lands.

Whatever the legitimacy of penumbras in US constitutional law, dwelling in penumbral spaces combining uncertainty and substance—where the half-seen is encountered as no mere distraction—has its benefits for historians. More legalistic minds might hanker for the secure jurisdiction and the bounded concerns that delineate Wolfenden's recommendations on homosexual offences as irrelevant to the recognition of so heteronormative a US marital right. Yet if penumbras imply a performance of judgment that is more strained than many lawyers might like, they also invite queerer modes of interpretation. Embracing rather than excusing the penumbras of *Griswold* sheds a significantly different light on a discrete moment of rule-bound decision-making that had ostentatiously distanced itself from queerness. And it suggests shadowy implications stretching into legal history and beyond. Law may possess a particular talent for implying a total universe of state and professional institutions, penmanship, and precedent, which penumbras can open up. The playful effervescences of queer history and aesthetics, however, stand usefully to unsettle anyone able to imagine dark, enclosed closets as seemingly boundless and spectacular with just a crack of light. Perverting established origins stories regarding a US right to sexual privacy airs the covert revelations and denied intimations that recur in queer navigations

---

<sup>98</sup> Oliver Wendell Holmes, "The Theory of Torts," *American Law Review* 7 (1873); see Burr Henley, "'Penumbra': The Roots of a Legal Metaphor," *Hastings Constitutional Law Quarterly* 15 (1987).

<sup>99</sup> *Towne v. Eisner*, 245 U.S. 418 (1918).

<sup>100</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *Roe v. Wade*, 410 U.S. 113 (1973). Note though that Stein's analysis of these cases in *Sexual Injustice* has highlighted the limits of the Warren Court's "progressivism" in these decisions too, despite its reputation.

<sup>101</sup> See, for instance, Catharine A. Mackinnon's 1983 essay on "Privacy v. Equality" in *Feminism Unmodified: Discourses on Life and Law* (Cambridge and London: Harvard University Press, 1987), 93-102.

across public and private. Even so radiant a subject as a supreme court may reveal a shady side when subjected to Sedgwick's concern for the complexities of "knowing and unknowing, recognition and misrecognition" – problems that have long inspired scholars of lesbian and gay history in analyzing the social roles of double lives and transgressions of less-than-separate spheres.<sup>102</sup>

My insistence on the tonal drama of *Griswold's* chiaroscuro floats a number of conceptual coordinates for historians to consider when approaching penumbras in their sources or pursuing a penumbral approach: the re-envisioning prompted by stimulating uncertainty, the dawning gradations that raise suspicion of binary extremes, the darker angles that add depth to the flatly floodlit, and the challenge of the seemingly liminal to governing epistemes. But given its intersections with "privacy" as a matter of both personal autonomy and information control, another crepuscular dynamic is worth elaborating here—one that arises from the generative tension between willfully abject queer subjects and overbearing haloes of definition. Michel Foucault's 1978 rumination on the "Lives of Infamous Men" invoked historical encounters with power through a penetrating light beam that momentarily snatched otherwise obscure persons "from the darkness of night where they could, and still should perhaps, have been able to remain." The flash of law's rule was among the power-knowledge mechanisms that produced a legacy of "dark legends" and "lightning existences," briefly looming up "from the shadows." Extrapolations from Foucault's disciplinary perspective have greatly influenced approaches to historical records and actors among queer scholars and many others. But while the terrible reach of legal and other governmental systems to cultivate taxonomies, shape inner lives, and determine pasts has often proved itself disturbingly efficacious, liberationist cries for full exposure through "coming out" into a gay world of sunshine also rang beyond the 1970s and shouldn't simply be dismissed as a foil. A gay lib historical narrative that culminates in authentic and world-changing self-representation may feel hopelessly outclassed by sophisticated disciplinary determinism, yet the co-dependence between discipline and emancipation discloses a twilight space that conjoins as well as divides these distinctive accounts. The Supreme Court's recognition of a US right to privacy may appear an inherently top-down process, but the imperfect and tantalizing field of perception presented by penumbras at least admits the potential for a kind of influence from the semi-darkness below.<sup>103</sup>

While Victor Stoichita has urged art historians to see shadow as not merely absence but the very ground making forms of vision possible, historians themselves still have much to reckon with about the prospects and perils of visibility in the penumbral spaces of records and imaginaries. There they may discover alternate visions of both artistry and change over time. In terms of the queer development of a US constitutional right to privacy that did not extend to gay sex until 2003, there remains a paradox to underline, for as legal scholars paid greater attention to potential constitutional protections for gay people in the 1970s, the chance of the Supreme Court recognizing same-sex intimacy as a fundamental right receded.<sup>104</sup> In outline, this can be attributed to the more conservative personnel of the Burger Court, backlash after *Roe v. Wade* against "judicial activism," and homosexuality's potency as an issue of cultural warfare up to and beyond

---

<sup>102</sup> I take this characterization of Sedgwick from George Chauncey, *Gay New York: Gender, Urban Culture, and the Makings of the Gay Male World* (New York: Basic Books, 1994), 375 (fn. 9).

<sup>103</sup> Michel Foucault, "The Life of Infamous Men," in Meaghan Morris and Paul Patton (eds.), *Michel Foucault: Power, Truth, Strategy* (Sydney: Feral Publications, 1979).

<sup>104</sup> *Lawrence v. Texas* 539 U.S. 558 (2003).

the start of the US AIDS crisis. There is though something symptomatic about the abatement of Wolfenden's jurisprudential legacy that backlights the dynamics of the Supreme Court's original penumbral encounter. Glanced at askance, Wolfenden enabled constitutional emanations; viewed directly, it threatened the rarefied domain of constitutional protections.

To look into *Griswold's* penumbras is not only to appreciate the complexity and ambiguity of a legal decision, but also to recalibrate our sense of what illuminates its history. Homophiles, with their pseudonymous personas, their members-only forums, their enshadowed TV appearances, and their generally marginalized presence are not always easy to picture as either enlightened or enlightening historical actors. Yet in forming a social movement whose public aspirations necessarily wrestled with the political purchase of privacy, they were perhaps even better placed than Supreme Court justices to understand that "harmless, empty shadows" could turn out to be nothing of the kind.